No. 87-526

In The
Supreme Court of the United States
October Term, 1987

BOBBY FELDER,
Petitioner,

v.

DUANE CASEY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether states may condition access to their courts in actions brought under 42 U.S.C. § 1983 by requiring plaintiffs to comply with state notice of claim statutes?

PARTIES

The petitioner in this Court is Bobby Felder, who was the plaintiff in the proceedings below. Respondents are Duane Casey, Patrick Eaton, Robert Farkas, Peter Pochowski, Robert Connolly, Edward Heideman, Stanley Olsen, Roger Weber, Michael Kempfer, and Gary Hoffman.

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OPINIONS BELOW

The opinion of the Wisconsin Supreme Court reversing the Court of Appeals is reported at 139 Wis.2d 614, 408 N.W.2d 19 (1987), and is reprinted at pp. A-1 to A-20 of the Appendix to the Petition for Certiorari.

The opinion of the Wisconsin Court of Appeals, dated April 24, 1986, is unreported but is reprinted at pp. A-21 to A-24 of the Appendix to the Petition for Certiorari.

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JURISDICTION

The Wisconsin Supreme Court issued its opinion on June 24, 1987, reversing the decision of the Wisconsin Court of Appeals and remanding the case to the Milwaukee County Circuit Court with instructions to dismiss the action. The Petition for Certiorari was filed on September 22, 1987, and granted on November 9, 1987.

The jurisdiction of this Court to review the opinion and judgment of the Wisconsin Supreme Court is invoked under 28 U.S.C. § 1257(3).

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STATUTES INVOLVED

This case involves the following statutes, the relevant portions of which provide:

42 U.S.C. § 1983 (1982)

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 (1982)

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Wis.Stat.Ann., § 893.80 (West 1983 & Supp. 1986)

§ 893.80 Claims against governmental bodies or officers, agents or employes; notice of injury; limitation of damages and suits.

(1) Except [with respect to medical malpractice claims] as provided in sub. (1m), no action may be brought or maintained against any . . . governmental subdivision or agency thereof nor against any officer, official, agent or employe of the . . . subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the . . . governmental subdivision or agency and on the officer, official, agent, or employe under s.801.11. Failure to give the requisite notice shall not bar action on the claim if the . . . subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant . . . subdivision or agency or to the defendant officer, official, agent or employe; and

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant . . . subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant . . . No action on a claim against any defendant . . . subdivision or agency nor against any defendant officer, official, agent or employe, may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect.

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STATEMENT OF THE CASE

In the early evening of Independence Day, July 4, 1981, and in the presence of his wife, children, and neighbors, (A-18)[1] Bobby Felder was stopped for questioning by Milwaukee police officers outside his home in Milwaukee, Wisconsin. The police officers were combing the

[1]In this Brief, references to the Appendix to the Petition for Certiorari, which contains the decisions of the Wisconsin appellate courts, are indicated by "A—." References to the Joint Appendix are indicated by "J.A. —." References to the transcripts of the non-evidentiary hearings before the trial court are indicated by "Tr. —."

neighborhood and were looking for an armed individual who was reported to be in the area and who was later apprehended and arrested. (A-3)

According to police reports, Felder was not cooperative and began to shout profanities, thereby attracting neighborhood attention. Felder's neighbors, however, successfully intervened and exonerated him, and the police reportedly told Felder to go home. Felder, allegedly, continued to be loud and abusive and reportedly pushed an officer. (A-3)

Minutes later, members of the Milwaukee Police Department Tactical Enforcement Unit arrived and arrested Felder for disorderly conduct. At this point, the police officers, including members of the Tactical Enforcement Unit, beat Felder with batons, carried him to a paddy wagon while he was partially unconscious, and threw him through the air and into the paddy wagon. (A-3)

In his complaint, Felder alleged that several of the defendant police officers,

> without any provocation from plaintiff, assaulted and battered plaintiff by the use of Police Department night sticks or similar weapon, fists, and other physical force by those defendants against plaintiff. The force against plaintiff resulted in plaintiff being restrained, battered, handcuffed behind his back, thrown to the ground, and beaten until plaintiff was lying unconscious or semi-conscious, face down, on the ground. Thereafter three or more individual defendants dragged plaintiff to a Milwaukee police van and in so dragging plaintiff, deliberately held his body so that plaintiff's face was dragging on the ground and thereafter these defendants threw plaintiff into the police van head first.

Plaintiff's Second Amended Complaint, para. 15 (J.A. 15).

Felder was charged with a municipal (civil) ordinance violation of disorderly conduct, but the Milwaukee City Attorney subsequently dropped the charge. (A-3; A-22)

Felder is black and all the police officers present at the scene are white. (A-3) Felder alleged that the deffendants' conduct, including their attempt to cover up their unlawful conduct by falsely charging him with having violated the law, was racially motivated. *See* Plaintiff's Second Amended Complaint, paras. 10, 21, 33, 35, 52 and 55. (J.A. 13, 15, 17, 18, 23, and 24)

Within hours of the July 4, 1981 incident, Milwaukee Common Council Alderman Roy Nabors made a telephone complaint which concerned the alleged mistreatment of Felder and which resulted in an immediate investigation of the incident. In that investigation, Milwaukee police officers took statements from at least ten civilian witnesses who confirmed that plaintiff Felder had been subjected to wrongful and excessive use of force. Plaintiff's Second Amended Complaint, para. 29, 30. (J.A. 16, 17) In addition, Alderman Nabors sent Police Chief Harold Breier a letter in which he included a number of witness statements and personally informed Chief Breier of the incident. (A-13) *See* Ex. 35.

On April 2, 1982, less than nine months after his arrest, Felder filed in the Milwaukee County Circuit Court this § 1983 damage action against one known Milwaukee police officer, respondent Kempfer, and unknown officers identified as John Doe. On January 14, 1983, Felder filed a First Amended Complaint renaming respondent Kempfer and adding respondent Hoffman and two additional Milwaukee police officers as defendants. (J.A. 1) On March 8, 1984, Felder filed a Second Amended Complaint renaming the four police officers and adding eleven new defendants. (J.A. 1, 10-26)

This action was filed under § 1983[2] and alleged violations of rights secured by various amendments to the

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[2]Felder also included a claim based on 42 U.S.C. § 1985(2) (1982) in which he alleged a racially-motivated conspiracy to

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United States Constitution, including the fourth and the fourteenth, as well as state law tort and conspiracy claims. Plaintiff's Second Amended Complaint, paras. 1, 45, 47, 53, 59 (J.A. 10, 22-25).

In each of their Answers, the defendants raised the affirmative defense of non-compliance with Wis. Stat. Ann. § 893.80 (West 1983 & Supp. 1986) (hereinafter cited as "§ 893.80"), the notice of claim requirement.[3] (A-4)

On March 4, 1985, this case went to trial against ten Milwaukee police officers on state and federal claims involving false arrest, the use of excessive force, false imprisonment, and conspiracy. (A-4) The case was heard before a jury and presided over by the Honorable Robert W. Landry, Circuit Court Judge for Milwaukee County. (J.A. 4)

During four days of trial, Felder and his wife testified, as did several of his neighbors who had witnessed the events in question. *See* Ex. 35 & J.A. 6. Plaintiff also

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interfere with his access to the state courts. See Plaintiff's Second Amended Complaint, para. 55 (J.A. 24). All the Wisconsin courts in this case have treated the § 1983 and § 1985(2) claims identically for purposes of the notice of claim issue, and in his Petition for Certiorari and this Brief Felder has only referred to his § 1983 claims.

[3]The notice of claim requirement in § 893.80 really consists of multiple requirements. First, a prospective plaintiff must serve a "written notice of the circumstances of the claim" within 120 days of the event on *both* the governmental entity and the employee. *See* § 893.80(1)(a). Second, an "itemized statement of the relief sought" must be presented to the governmental entity. *See* § 893.80(1)(b). These are separate requirements, although they may be included in a single document. *See Gutter* v. *Seamandel*, 103 Wis.2d 1, 10 n.4, 308 N.W.2d 403, 408 n.4 (1981) (construing predecessor to § 893.80). No suit may be brought until the claim is disallowed or 120 days pass, *see* § 893.80(1)(b), and any suit must be brought within six months of service of the notice of disallowance. *Id.*

called three defendants adversely and presented medical testimony. In addition, plaintiff called as a witness Milwaukee Alderman Roy Nabors, an elected member of the Milwaukee Common Council, who had responded to a call from Felder's neighbors that evening and who testified about the police investigation Alderman Nabors initiated into the incident. (J.A. 5-6)

On March 4, 1985, prior to the start of the trial, the trial court had rendered an oral decision denying the defendants' motion to dismiss the action based on Felder's non-compliance with § 893.80. On March 8, 1985, after four days of testimony, the trial court issued a written decision consistent with its oral decision.[4] Finally, at the close of plaintiff's case on March 8, 1985,[5] the trial court again denied defendants' motion to dismiss Felder's federal claims for non-compliance with § 893.80[6]

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[4]In its March 4, 1985 oral decision and March 8, 1985 written decision, the trial court assumed that § 893.80 was applicable and concluded that actual notice had been provided, *see* Tr. 2-6 (March 4, 1985); Decision (March 8, 1985), but the court ruled that under § 893.80 Felder would have to demonstrate at trial that no prejudice resulted from his failure to provide statutory notice.

[5]In summarizing the history of the case, the Wisconsin Supreme Court stated that the trial court dismissed Felder's civil rights claims after the defense rested, (A-4) but that statement is erroneous. The trial court in its Amended Order for Judgment noted that it ruled on the motions at the close of plaintiff's case. (A-25) This discrepancy, however, has no bearing on this case as the judgment of the Wisconsin Supreme Court rests squarely on its conclusion that Felder was required to comply with the notice of claim statute as a condition of bringing a § 1983 action in the Wisconsin courts.

[6]At the March 8, 1985 hearing, the trial court reiterated its earlier conclusion that actual notice was provided but found that Felder failed to make a claim for a "specific sum" and dismissed his state law claims. However, the trial court then concluded that the notice of claim requirement did not apply to § 1983 actions. Tr. 23-30 (March 8, 1985).

At the March 8, 1985, hearing, however, the trial court *sua sponte* dismissed Felder's § 1983 and related federal claims against the eight respondent police officers named in the Second Amended Complaint based on the statute of limitations. In dismissing these claims, the trial court initially ruled that the two-year limitations period for intentional torts in Wis. Stat. Ann. § 893.57 (West 1983) was applicable. Tr. 39, 43, 51 (Mar. 8, 1985). After this Court's April 17, 1985, decision in *Wilson v. Garcia,* 471 U.S. 261 (1985), however, the trial court modified its decision and ruled that the three-year limitations period for "injuries to the person" in Wis. Stat. Ann. § 893.54(1) (West 1983) applied to § 1983 actions in Wisconsin but only prospectively. Tr. 18, 20-23 (Apr. 30, 1985). Thus, it reaffirmed its earlier decision dismissing Felder's § 1983 claims based on the two-year statute of limitations. (A-27) *See also* Amended Order for Judgment. (A-26 - A-27)

With respect to the two remaining defendants, the trial court ordered the case to proceed, but Felder's counsel refused, and the trial court dismissed the § 1983 claims against the remaining defendants for failure to prosecute. (A-26)

Felder then successfully appealed to the Wisconsin Court of Appeals, which on April 24, 1986, unanimously reversed the decision of the trial court and held that the three-year limitations period for personal injury actions in Wis. Stat. Ann. § 893.54(1) (West 1983) applied retroactively to his § 1983 case. The defendants cross-appealed, arguing that Felder's § 1983 claims "are barred by his failure to comply with the notice of claims statute sec. 893.80, Stats., and by *Parratt v. Taylor,* 451 U.S. 527 (1981)." (A-23) The Court of Appeals, however, rejected the defendants' cross-appeal and summarily reversed those portions of the judgment dismissing Felder's federal civil rights claims against the eight respondents brought into the case by the Second Amended Complaint. (A-24)

The Wisconsin Supreme Court granted review in a petition filed by all ten of the respondents. The court also granted Felder's cross-petition, which was based on the uncertainty of the disposition of his § 1983 claims against the two police officers against whom his action was timely. (A-5)

On June 24, 1987, the Wisconsin Supreme Court by a four-three vote reversed the decision of the Court of Appeals and remanded the case to the trial court with instructions to dismiss the action. The court did *not* address the statute of limitations or the *Parratt* issues, but rather disposed of all Felder's § 1983 claims solely because of his failure to comply with the notice of claim requirement.

Initially, the Wisconsin Supreme Court concluded that as a matter of state law the notice of claim requirement applied to § 1983 actions filed in the Wisconsin courts.[7] (A-9) The court then rejected Felder's federal supremacy argument and held that "failure to comply with § 893.80, Stats., bars a litigant who is pressing a federal civil rights claim from proceeding with that claim in state court."[8] (A-12)

In concluding that Wisconsin courts could apply the notice of claim statute to § 1983 actions, the Wisconsin Supreme Court relied heavily on its decision in *Kramer v. Horton,* 128 Wis.2d 404, 383 N.W.2d 54, *cert. denied,*

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[7]In construing § 893.80 to apply to § 1983 actions, the Wisconsin Supreme Court relied on the broad language of the statute (A-9) and to its earlier decision applying the statute to all actions, including actions for injunctive relief. *See Figgs v. City of Milwaukee,* 121 Wis.2d 44, 52, 357 N.W.2d 548, 553 (1984).

[8]The Wisconsin Supreme Court did not expressly state whether the waiting period in § 893.80(1)(b) also applied to § 1983 actions, but given the court's discussion of the purposes of the notice of claim requirement and its unqualified application to this case, it is clear that the court also intended the waiting period to apply to § 1983 actions.

107 S.Ct. 324 (1986), in which it had held that the tenth amendment permitted states to require plaintiffs to exhaust administrative remedies as a condition of bringing § 1983 actions in state courts. (A-11 - A-12)

> While the Constitution vests in Congress "the power to prescribe the basic procedural scheme under which claims may be heard in federal courts," . . . it reserves to the state legislatures and state courts the power to prescribe the procedural scheme under which claims may be heard in state court. (A-11 - A-12) (quoting *Kramer*, 128 Wis.2d at 417, 383 N.W.2d at 59)

The court then characterized the notice of claim statute as "procedural" and stated: "that litigants who choose to press their claims in state court cannot 'elect' to ignore state procedural rules. The right to sue in state court is accompanied by the corollary duty to abide by certain rules and procedures. Section 893.80 is an example of just such a procedure." (A-12)

In reaching this conclusion, the Wisconsin Supreme Court acknowledged the existence of federal court decisions refusing to apply notice of claim statutes to § 1983 actions, but found these decisions inapplicable because the present case had been brought in *state* court. (A-11) The court then noted that § 1983 plaintiffs were free to litigate their claims in federal court. (A-12)

In addition, the Wisconsin Supreme Court addressed whether the failure of the plaintiff to give a formal statutory notice could be excused since, under § 893.80(1)(a), such failures are not fatal if the city had "actual notice" of the claim and the plaintiff could show that the failure to give notice was not prejudicial to the defendants. (A-12 - A-13)

Without reaching whether the absence of statutory notice was prejudicial, (A-14) the court held that neither the intervention of a Milwaukee alderman within hours

of the arrest, his written communication requesting an investigation, *see* Ex. 35, nor the actual investigation that was begun shortly after the incident met the "actual notice" requirement. (A-12 - A-14)[9]

Therefore, the Wisconsin Supreme Court held that the failure to comply with § 893.80 precluded Felder from proceeding further with his § 1983 action in state court. The court then reversed the decision of the Court of Appeals and remanded to the trial court with instructions to dismiss Felder's action. (A-15)

Three justices of the Wisconsin Supreme Court dissented.

Justice Shirley S. Abrahamson, joined by Chief Justice Nathan S. Heffernan, concluded that § 893.80 was inapplicable to § 1983 actions. First, they looked to the legislative history of § 893.80, which was adopted in response to the abrogation of governmental immunity from tort liability in *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962), and concluded that the Wisconsin Legislature did not intend § 893.80 to apply to § 1983 actions. (A-17) Second, they concluded that the application of § 893.80 to § 1983 actions was inconsistent with controlling principles of federal law. (A-17)

In a separate dissent, Justice William A. Bablitch characterized the notice of claim statute as a "subtlety of state procedural law that must give way to the vindication of federal rights in state courts." (A-19) He also looked to the purpose of the notice of claim statute of avoiding prejudice to governmental units by the late

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[9] In reaching this conclusion, the court held that the 'notice" in this case did not meet the "actual notice standard" of its earlier decisions under which "documents" constituting "adequate notice" had usually, at a minimum, cited the facts giving rise to the injury and indicated an intent on the plaintiff's part to hold the city responsible. (A-14)

filing of claims and concluded that the notice given in the present case permitted a prompt investigation that "more than fulfilled" the purpose of the statute. (A-20)

SUMMARY OF ARGUMENT

State courts that entertain federally-created actions may not rely on state policies, whether characterized as procedural or substantive, that burden federal rights or are inconsistent with the federal definition of the cause of action. *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Davis v. Wechsler*, 263 U.S. 22 (1923). Moreover, this Court has rejected the use of a notice of claim requirement as a condition of litigating a federal claim in state courts. *El Paso & N.E. Ry. v. Gutierrez*, 215 U.S. 87 (1909) (FELA action).

State courts that entertain § 1983 actions are also required to apply federal policies that are part of the § 1983 cause of action. *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Martinez v. California*, 444 U.S. 277 (1980). The application of notice of claim requirements to § 1983 litigation, however, conflicts with the definition of the § 1983 cause of action.

Section 1983 entitles plaintiffs to direct access to judicial forums without regard to the availability or adequacy of state administrative remedies. *Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496 (1982).

Section 1983 plaintiffs are also entitled to rely on the general limitations period for personal injury actions, *see Wilson v. Garcia*, 471 U.S. 261 (1985), but the use of a 120-day notice of claim requirement conflicts with this policy, ignores the practicalities of litigation, and denies plaintiffs a "reasonable time to sue." *Burnett v. Grattan*, 468 U.S. 42, 50-51 & 53 n.15 (1984).

Notice of claim requirements are part of state immunity statutes that limit governmental liability, but the immunities applicable in § 1983 cases are derived from federal law. Notice of claim requirements were unknown at common law and, when they exist, are solely statutory requirements. Had the 42d Congress intended to permit the use of notice of claim requirements in § 1983 litigation, they would have provided so explicitly.

Although courts entertaining § 1983 actions may look to state law to fill gaps in federal law, under 42 U.S.C. § 1988, they may borrow state policies only when federal law is deficient. *Burnett v. Grattan, supra.* The mere absence of a federal policy requiring the use of notice of claim requirements is not a deficiency in federal law. *Robertson v. Wegmann*, 436 U.S. 584 (1978); *Brown v. United States*, 742 F.2d 1498 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1073 (1985).

State courts entertaining § 1983 actions may sometimes apply state counterparts to policies that apply only in federal courts, but state courts may not burden § 1983 litigation or apply policies that are inconsistent with either the definition or the purposes of § 1983. Moreover, even when federal law is deficient, courts only borrow state policies that are appropriate in light of the purposes of § 1983. *Burnett v. Gratton, supra.* Notice of claim requirements, however, give governmental defendants special protection in traditional municipal tort litigation and have little relevance to § 1983 actions to enforce federal rights.

Even if notice of claim requirements were applicable to state court § 1983 litigation, their use to dismiss this case (in which an investigation was conducted within days of the incident) is a subtlety of state procedural law and an inadequate state ground that must give way to the vindication of plaintiff's federal rights.

The use of notice of claim requirements in state but not federal court § 1983 litigation will discourage plaintiffs from filing § 1983 actions in state courts. Most § 1983 litigation takes place in federal courts, but plaintiffs must be free to file federal claims in state courts if state courts are to play their proper role in our system of judicial federalism. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

The tenth amendment does not guarantee state courts entertaining § 1983 actions the right to require compliance with notice of claim requirements. Such requirements are not indisputable attributes of state sovereignty. Nor would their rejection directly impair the state's ability to structure integral operations in areas of traditional governmental functions. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Moreover, any impact on state courts from the rejection of notice of claim requirements in § 1983 litigation is likely to be minimal and indirect.

Section 1983 was enacted, in part, because of the inadequacy of state remedies, and it would be anomalous to apply state policies that limit the liability of municipal defendants to § 1983 litigation.

ARGUMENT

I. STATE COURTS THAT ENTERTAIN § 1983 ACTIONS ARE REQUIRED TO APPLY THE ENTIRE FEDERAL CAUSE OF ACTION.

State courts have concurrent jurisdiction over § 1983 actions, *see Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980), but this Court has expressly reserved whether state courts are obliga ! to entertain § 1983 actions.[10] Nonetheless, state

[10]In reserving this question, the *Martinez* Court relied on the nondiscrimination principle of *Testa v. Katt*, 330 U.S. 386

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courts that entertain federally-created actions, including § 1983 actions,[11] are required to apply the entire federal

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(1947), to point out that state courts that entertained "the same type of claim, if arising under state law . . . are generally not free to refuse enforcement of the federal claim." 444 U.S. at 283 n.7. *See also McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934) (prohibiting Alabama courts from discriminating against federally authorized FELA actions). *Cf. Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982) (upholding federal statute requiring state public utility rate-making bodies to consider certain energy-saving measures).

State courts, however, are required to do more than refrain from discriminating against federal causes of action. In *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1 (1912), the Connecticut courts of general jurisdiction refused to entertain FELA actions because of their disagreement with the policies underlying that federal statute. Classifying that disagreement as "inadmissible," *id.* at 57, and relying on the presumption of concurrent jurisdiction, *see Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876), this Court stated that "[t]he existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." *Mondou*, 223 U.S. at 58. *Mondou* established an affirmative duty of state courts to hear federal cases within their jurisdiction, and state courts should no more be permitted to refuse to exercise jurisdiction over § 1983 actions than the courts of Connecticut were able to refuse to entertain FELA cases.

It is not necessary, however, to resolve the issue of the duty of state courts to entertain § 1983 actions in the present case, because Wisconsin, like Maine and California, *see Thiboutot*, 448 U.S. at 3 n.1; *Martinez*, 444 U.S. at 283 n.7, has voluntarily opened its courts to § 1983 actions. *See Terry v. Kolski*, 78 Wis. 2d 475, 254 N.W.2d 704 (1977).

[11]At present, no state categorically refuses to entertain § 1983 actions in their courts, and there are appellate court decisions in virtually all states expressly or implicitly opening the courts of that state to § 1983 litigation. *See* S. Steinglass, *Section 1983 Litigation in State Courts*, app. E (1988). The Tennessee Supreme Court had previously held that jurisdiction over § 1983 actions was exclusively federal, *see Chamberlain v. Brown*, 223 Tenn.

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cause of action with all its remedial attributes. The decision of the Wisconsin Supreme Court applying the state notice of claim requirement to § 1983 actions conflicts with this principle.

A. State Courts Entertaining Federally-Created Actions Must Hear the Entire Federal Cause of Action.

In the present case, the Wisconsin Supreme Court held that § 1983 "litigants who choose to press their claims in state court cannot 'elect' to ignore [state] procedural rules." (A-12) This characterization of the notice of claim requirement as procedural, however, does not support the use of a state policy that has a substantial impact on the litigation of federal claims in state courts. State characterizations of policies as "procedural" or "substantive" do not control choice of law decisions, *cf. Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945), and state courts that entertain federal causes of action may not impose state policies that burden the litigation of federal claims or conflict with the federal definition of the cause of action.

In *Davis v. Wechsler*, 263 U.S. 22 (1923), a personal injury suit against a railroad under federal control during World War I, the state courts applied a state practice to conclude that the railroad had waived its federal venue defense. In rejecting this position, Justice Holmes, writing for a unanimous Court, ruled that the state practice could not defeat the assertion of the federal right, noting that "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Id.* at 24.

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25, 442 S.W.2d 248 (1969), but in *Poling v. Goins*, 713 S.W.2d 305 (Tenn. 1985), the court overruled *Chamberlain* and held that the Tennessee state courts could exercise concurrent jurisdiction over § 1983 actions.

In *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), a state court action under the Jones Act, this Court rejected a state policy that placed the burden of proof on the validity of releases on plaintiffs despite the federal practice of placing the burden on ship owners. The Pennsylvania Supreme Court, like the Wisconsin Supreme Court in the present case, had characterized the state rule as merely procedural and applied it in the federally-created action. Without deciding whether states were required to make their courts available for enforcing federal claims, this Court prohibited the Pennsylvania courts from altering rights established under federal law.

> The source of the governing law applied is in the national, not the state, government. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. . . . [I]n trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.

Id. at 245 (footnotes omitted). The fact that Pennsylvania had voluntarily "opened its courts to petitioner to enforce federally created rights" was enough to require the state to give plaintiffs "the benefit of the full scope of these [federal] rights," *id.* at 249, and the state courts did not have authority to reject a policy that "inhered in . . . [the federal] cause of action." *Id.*[12]

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[12]In requiring state courts to give full effect to federal rights, the *Garrett* Court relied on *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the goal of "assur[ing] litigants full protection

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In *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949), this Court rejected a strict state pleading rule that resulted in the dismissal of a FELA action. This Court granted certiorari "because the implications of the dismissal were considered important to a correct and uniform application of the federal act in the state and federal courts." *Id.* at 295. Noting that "[t]his federal right cannot be defeated by the forms of local practice," this Court reversed the dismissal. *Id.* at 296.

Finally, in *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952), this Court addressed the question whether the judge or jury in FELA cases decided factual issues of fraud in the execution of a release. As a matter of local practice in personal injury cases, the Ohio courts refused to extend the right to trial by jury because of the equitable nature of the defense. Despite the inapplicability of the seventh amendment to the states, this Court rejected the Ohio practice of singling out one phase of the trial for determination by the judge. In so ruling, this Court characterized the right to jury trial as "too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule or procedure.'" *Id.* at 363.[13]

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for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates." *Garrett*, 317 U.S. at 245. *Cf. Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939) (federal courts must follow state burden of proof in diversity cases).

[13]In *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211 (1916), this Court permitted state courts that entertained FELA actions to use non-unanimous jury verdicts, but that decision is based on a finding that Congress did not intend to impose all aspects of the seventh amendment on the state courts. It also anticipated subsequent decisions giving states greater latitude in implementing federal jury guarantees. *Cf. Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding nonunanimous jury verdicts in state criminal cases); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (same).

This Court has also rejected the application of notice of claim requirements to federally-created actions. In *El Paso & Northeastern Railway v. Gutierrez*, 215 U.S. 87 (1909), a widow filed a FELA action against a railroad in the Texas state courts for damages arising out of the death of her husband. The railroad set up as a full defense[14] the plaintiff's failure to comply with a territorial notice of claim statute.[15] Concluding that "an act of Congress . . . would necessarily supersede the territorial law regulating the same subject," *id.* at 93, this Court held that the failure to comply with the notice of claim requirement did not bar the plaintiff from litigating her federal claim in a state court.

The decision of the Wisconsin Supreme Court requiring the plaintiff to comply with the state notice of claim requirement conflicts with this Court's approach to notice of claim statutes in *Gutierrez* and with the requirement that state courts entertaining federal causes of action accept the entire cause of action with all its remedial attributes. The mere characterization of a state practice as procedural is not sufficient to require compliance with that practice when federal claims are litigated in state courts.[16]

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[14]The railroad also claimed that the federal act could not be applied to the territories because of this Court's decision in the *Employers' Liability Cases*, 207 U.S. 463 (1908) (holding the original FELA statute unconstitutional), but this Court held the federal act to be severable. *Gutierrez*, 215 U.S. at 96-97.

[15]This Court had previously upheld the application of the same territorial statute in the Texas state courts, *see Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55 (1909), and therefore the railroad would have had a good defense but for the federal nature of the plaintiff's claim. *See Gutierrez*, 215 U.S. at 92-93.

[16]Federal courts that have addressed notice of claim issues in the course of entertaining state law claims under diversity and pendent jurisdiction have refused to classify notice of claim requirements as procedural and have applied such state policies to state law claims. *See, e.g., Orthmann v. Apple River Camp-*

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B. State Courts Entertaining § 1983 Actions Must Apply the Entire Federal Cause of Action.

This Court has not addressed the application of notice of claim requirements to state court § 1983 litigation, but it has required state courts that entertain § 1983 acions to first define the scope of the federal cause of action and then to apply § 1983 with all its remedial attributes. In taking this approach to state court § 1983 cases, this Court has applied the same principles developed in FELA litigation in which it required state courts to apply the policies that are part of the federally-defined cause of action.

In *Martinez v. California*, 444 U.S. 277 (1980), this Court refused to allow state parole officials to interpose a state-created immunity defense to a § 1983 claim, even though the action had been brought in a state court. At the time of *Martinez*, the immunity to which state parole officials were entitled under federal law was unsettled, but California provided them with absolute immunity. Without reaching whether California courts were required to entertain § 1983 claims, this Court noted that the California courts had accepted jurisdiction over § 1983 actions. *Id.* at 283 n.7. The Court then rejected the application of the state-created immunity to plaintiff's § 1983 claim. In taking this position, this Court made clear that federal law controls.

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ground, Inc., 757 F.2d 909, 911 (7th Cir. 1985) (diversity jurisdiction); *Piesco v. City of New York Dep't of Personnel*, 650 F.Supp. 896, 900-01 (S.D. N.Y. 1987) (pendent jurisdiction). This borrowing of state policies to govern state-created actions is consistent with the *Erie* doctrine under which federal courts look at the impact of state policies on the twin aims of *Erie* of avoiding forum shopping and assuring the equitable administration of the law. *See Hanna v. Plummer*, 380 U.S. 460, 468 (1965). The decision of the Wisconsin Supreme Court in this case, if not reversed, will produce different results in § 1983 cases in state and federal courts and will lead to the very evils this Court attempted to curb in *Erie* and its progeny.

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced . . . . The immunity claim raises a question of federal law.

Id. at 284 n.8 (quoting *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974)).

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court again made clear that the policies developed in federal court § 1983 litigation also applied to state court § 1983 actions. In *Thiboutot*, this Court held that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, applied in state court § 1983 litigation, despite the fact that the Act did not expressly authorize state courts to award fees. The Act was adopted in response to the decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), rejecting the inherent power of federal courts to award fees on a private attorney general basis, but it refers to "court" generically. In applying the Act to state courts, this Court relied on its legislative history, including the characterization of the fee provision as an "integral" part of the § 1983 remedy. 448 U.S. at 11.

Martinez, *Thiboutot*, and the FELA and other cases discussed earlier, *see supra* I.A., require state courts that entertain § 1983 actions to apply the full cause of action with all its remedial attributes. This requires state courts to address the scope of the § 1983 cause of action. The Wisconsin Supreme Court, however, ignored this threshold issue when it concluded that state courts could apply state notice of claim requirements. By failing to first define the scope of the remedy established by § 1983, the Wisconsin Supreme Court departed from the approach this Court has

followed in construing federally-created actions, including actions authorized by § 1983.[17]

II. THE APPLICATION OF STATE NOTICE OF CLAIM REQUIREMENTS TO § 1983 LITIGATION IS INCONSISTENT WITH PRINCIPLES DEVELOPED BY THIS COURT IN CONSTRUING § 1983.

By applying a special set of state statutory policies developed for litigation with municipal defendants, the Wisconsin Supreme Court has burdened the § 1983 cause of action and acted inconsistently with principles developed by this Court in construing § 1983. Wisconsin may use notice of claim requirements to limit liability in cases arising under state law. It may not, however, apply those policies to § 1983 actions.

A. The Use of State Notice of Claim Requirements In § 1983 Actions Is Inconsistent With This Court's Decisions in Patsy, Wilson and Martinez.

1. The notice of claim requirement is an impermissible exhaustion requirement.

The application of state notice of claim requirements to § 1983 litigation is inconsistent with this Court's interpretation of § 1983 as guaranteeing plaintiffs direct

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[17]Most state courts that have addressed the issue take the position that federal law bars the application of notice of claim requirements to state court § 1983 litigation. *See Williams v. Horvath*, 16Cal.3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976); *Mucci v. Falcon School Dist.*, 655 P.2d 422 (Colo. Ct. App. 1982); *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982); *Fuchilla v. Layman*, 210 N.J. Super. 574, 510 A.2d 281 (App. Div.), *cert. granted*, 105 N.J. 563, 523 A.2d 196 (1986); *Willborn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986); *Spencer v. City of Seagoville*, 700 S.W.2d 953 (Tex. Ct. App. 1985). *But see Clark v. Indiana Dep't of Pub. Welfare*, 478 N.E.2d 699 (Ind. Ct. App. 1985), *cert. denied*, 106 S.Ct. 2893 (1986); *423 South Salina St. v. City of Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63, 410 N.Y.S.2d 507 (1986), *appeal dismissed*, 107 S.Ct. 1880 (1987).

access to judicial forums regardless of the availability or adequacy of state administrative remedies.

In *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 516 (1982), this Court held that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy* involved a case that began in federal court, but the issue involved the scope of § 1983, which provides a federal remedy for the enforcement of federal rights because of the inadequacy of state remedies. *See Monroe v. Pape*, 365 U.S. 167, 173-74 (1961).

In adopting a no-exhaustion policy for § 1983 litigation, the *Patsy* Court did not limit its holding to federal courts. Rather, it noted broadly that "the 1871 Congress did not intend that an individual be compelled in every case to exhaust state administrative remedies before filing an action under [§ 1983]." 457 U.S. at 507.

The Wisconsin notice of claim statute does not provide claimants with adjudicatory hearings, but prospective § 1983 plaintiffs must exhaust state claim procedures and thus are denied the immediate access to judicial forums to which they are entitled.[18]

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[18]In *Ehlers v. City of Decatur*, 614 F.2d 54, 56 (5th Cir. 1980), Judge Godbold rejected the application of the Georgia ante-litem notice provision to § 1983 because of its resemblance to an exhaustion requirement.

> The statute at issue here consists of both a time limitation and a requirement of exhaustion of administrative remedies. . . . A litigant, however promptly he acts, is prevented from bringing suit unless he has notified the municipality of his intention to do so. Moreover, once he provides the requisite notice, he must still postpone his suit until either the municipality acts on his claim or 30 days elapses. . . . This is not a jurisdictional prerequisite but an explicit requirement of exhaustion of remedies.

Accord Majette v. O'Connor, 811 F.2d 1416, 1418 (11th Cir. 1987); *Mathias v. City of Milwaukee Dep't of City Dev.*, 377 F. Supp. 497, 500 (E.D. Wis. 1974).

Requiring state courts that entertain § 1983 actions to apply the full federal cause of action is consistent with the remedial purpose of § 1983. Section 1983 creates a cause of action: a remedy for violations of federal law. It neither confers jurisdiction on federal courts nor creates substantive rights, *see Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979), although the creation of a federal forum was clearly one of the goals of the 42d Congress.

In *Patsy*, this Court stated "that many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." 457 U.S. at 506. Given this goal, "[i]t would be anomalous . . . to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights." *Burnett v. Grattan*, 468 U.S. 42, 55 n.18 (1984) (quoting *Pauk v. Board of Trustees of City Univ. of N.Y.*, 654 F.2d 856, 862 (1981), *cert. denied*, 455 U.S. 1000 (1982)).

State courts that entertain § 1983 actions, however, are often reluctant to abandon familiar state policies. For example, in the present case, the Wisconsin Supreme court relied on its decision in *Kramer v. Horton*, 128 Wis.2d 404, 383 N.W.2d 54, *cert. denied*, 107 S.Ct. 324 (1986), in which it construed *Patsy* as applying only in federal courts. Such a narrow reading of *Patsy*, however, reflects a basic, but not isolated, misunderstanding of this Court's role in defining federal causes of action that may be litigated in *both* state and federal courts,[19] and has been described

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[19]In *Smith v. Wade*, 461 U.S. 30, 55 n.23 (1983), the Court pointed out that the uniform federal damage principles developed in § 1983 litigation applied in state as well as federal

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by Justice White as "questionable." *Caylor v. City of Red Bluff*, 474 U.S. 1037 (1985) (White, J., dissenting), *denying cert. to* No. 3 Civ. 2[illegible]3 (Cal. Ct. App. March 26, 1985).

2. The use of notice of claim requirements in § 1983 litigation is inconsistent with this Court's statute of limitations decisions.

The application of the Wisconsin 120-day notice of claim requirement in § 1983 litigation is also inconsistent with this Court's approach to the selection of the appropriate statute of limitations. In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court required courts entertaining § 1983 actions to borrow the general limitations period for personal injury actions and expressly rejected the use of a limitations period for wrongs committed by public officials. *Id.* at 279.

The Wisconsin notice of claim statute does not require the commencement of litigation within 120 days of the event. Nonetheless, it requires prospective § 1983 plaintiffs to take significant steps within the 120-day period, including the filing of a statutory notice that not only recites the facts giving rise to the injuries but also indicates an intent to hold the city responsible for the resulting damages. (A-14)

The use of the 120-day notice of claim period also ignores the "practicalities of litigation," which this Court described in *Burnett v. Grattan*, 468 U.S. 42, 50 (1984).

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courts, a point some state courts have been unwilling to accept. *See Nelson v. Lane County*, 79 Or. App. 753, 720 P.2d 1291 (1986) (punitive damages unavailable in § 1983 suits against governmental employees), *aff'd in part, rev'd in part on other grounds*, 304 Or. 97, 743 P.2d 692 (1987); *Williams v. McNeil*, 432 So.2d 950 (La. Ct. App.) (punitive damages unavailable in § 1983 litigation), *writ denied*, 437 So.2d 1151 (1983).

> Litigating a civil rights claim requires considerable preparation. An injured person must recognize the constitutional dimensions of his injury. He must obtain counsel, or prepare to proceed *pro se*. He must conduct enough investigation to draft pleadings that meet the requirements of federal rules; he must also establish the amount of his damages, prepare legal documents, pay a substantial filing fee or prepare additional papers to support a request of proceed in forma pauperis, and file and service his complaint. At the same time, the litigant must look ahead to the responsibilities that immediately follow filing of a complaint. He must be prepared to withstand various responses, such as a motion to dismiss, as well as to undertake additional discovery.

Many of these factors are applicable to claimants contemplating § 1983 actions. Injured parties must recognize the constitutional and other dimensions of their injury. They must also obtain counsel quickly or prepare to proceed *pro se*. Claimants need not draft "pleadings," but they must meet the often technical requirements that characterize notice of claim statutes. They or their attorneys must also conduct enough of an investigation to conclude that they have a bona fide claim. Claimants in Wisconsin must also determine the precise amount of their damages, because the Wisconsin courts interpret § 893.80(1)(b) as requiring a "specific sum" to be included in the "itemized statement of the relief sought." *See Gutter v. Seamandel*, 103 Wis.2d 1, 308 N.W.2d 403, 409 (1981) (claim for "in excess of $25,000" does not meet statute); *Patterman v. City of Whitewater*, 32 Wis.2d 350, 358-59, 145 N.W.2d 705, 709 (1966) (claim stating that "damages would not exceed $25,000 statutory limitations" does not meet statute).

The requirement that § 1983 plaintiffs take these steps substantially in advance of filing their complaint deviates from the policies adopted in *Wilson*. In the present case, the Wisconsin Court of Appeals concluded that a three-

year limitations period applied, (A-22 - A-23) but the Wisconsin Supreme Court dismissed the action because Felder did not file a statutory notice within 120 days of the event giving rise to his action. This application of the notice of claim requirement to § 1983 litigation effectively imposes a 120-day limitations period borrowed from the state statute governing wrongs committed by public officials. This Court in *Wilson*, however, explicitly rejected the analogous limitations period from the New Mexico Tort Claims Act. 471 U.S. at 279.

State statutes of limitations applicable to federal rights "must give a party a reasonable time to sue." *Campbell v. Haverhill*, 155 U.S. 610, 615 (1895), *cited with approval in Burnett v. Grattan*, 468 U.S. 42, 53 n.15 (1984). The use of a 120-day notice of claim requirement in § 1983 litigation fails to give plaintiffs adequate time to prepare civil rights litigation. It is also inconsistent with this Court's goal in *Wilson* of selecting the neutral general limitations period for personal injury actions to assure that states do not intentionally or otherwise discriminate against § 1983 claims. 471 U.S. at 279.

3. The application of notice of claim requirements to § 1983 litigation is inconsistent with this Court's immunity decisions.

Notice of claim requirements are part of state immunity statutes that limit the liability of local governmental entities and their employees. The application of such state policies to § 1983 litigation, however, is inconsistent with this Court's approach to § 1983 immunity issues, which this Court has consistently treated as matters of federal law. *See, e.g., Owen v. City of Independence*, 445 U.S. 622 (1980); *Martinez v. California*, 444 U.S. 277 (1980); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

In addressing the immunities available in § 1983 litigation, this Court has looked to the status of the claimed immunity at common law in 1871. When the immunity

was well established, this Court has been unwilling to assume that Congress would have rejected the immunity absent some clear evidence of congressional intent. *See Briscoe v. LaHue*, 460 U.S. 325, 330-34 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-59 (1981); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). On the other hand, when an immunity did not exist at common law or was not well established, this Court has construed § 1983 literally and denied the immunity despite the absence of guidance in the legislative history. *See Tower v. Glover*, 467 U.S. 914 (1984); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

In 1871, when the predecessor of § 1983 was enacted, "municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis. In particular, they were routinely sued in both federal and state courts." *Owen v. City of Independence*, 445 U.S. 622, 639 (1980). *See also Monell v. Department of Social Serv.*, 436 U.S. 658, 687-88 (1978).[20]

Notice of claim requirements were unknown at common law, and, when they exist, are solely statutory requirements. *See* C. Antieau, *Municipal Corporation Law* § 11.211 (1987); E. Yokley, *Municipal Corporations* § 518 (1958); E. McQuillin, *Municipal Corporations* § 48.03, at 54 (3d ed. 1982); C. Elliott, *Municipal Corporations* § 204 (2d ed. 1910); J. Dillon, *Municipal Corporations* § 937, at 1142 n.5 (4th ed. 1890). *See also Green v. Spencer*, 67 Iowa 410, 25 N.W. 681 (1885).

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[20]The present case involves a suit against municipal employees not the municipality, but the Wisconsin notice of claim requirement applies to suits against both municipalities and their employees. Thus, under § 893.80(1)(a) & (b), a plaintiff must file a notice of claim with the municipality to sue a municipal employee.

The 42d Congress vigorously debated proposals involving the liability of municipalities, *see Monell*, 436 U.S. at 664-83, but § 1 of the Civil Rights Act of 1871 does not contain a notice of claim requirement. Nor was a notice of claim requirement included in the First Conference Report on the Sherman Amendment. *See Monell*, 436 U.S. at 703-04. This proposed amendment sought to make the "county, city, or parish" liable for illegal activities within its borders and is the only statutory provision in the proposed legislation in which municipal liability is addressed expressly. The proponents of this amendment went to great lengths to emphasize the procedural safeguards that would limit governmental liability, and Senator Edmunds noted that "[i]f the municipality or its inhabitants are to be made responsible at all, we have adopted the tenderest and most convenient way." Cong. Globe, 42d Cong., 1st Sess. 756 (1871). These "safeguards" primarily involved detailed provisions on the joinder of co-defendants suspected of the outrages and on the execution and subrogation of judgments. *Id* at 751 (Rep. Shellabarger); *id.* at 756 (Sen. Edmunds). The concerns of the opponents, however, were not allayed, and Senator Thurman criticized the proposal as going further than the law of England in dispensing with conditions precedent to sue, including notice of claim requirements. *Id.* at 770 (discussing the English seven-day claim requirement).

The First Conference Report was ultimately rejected for reasons involving the constitutionality and wisdom of imposing this far-reaching liability on local government, *see Monell*, 436 U.S. at 668-69, but the broad remedial civil action in § 1, *see Monell*, 436 U.S. at 684 (quoting Rep. Shellabarger), subjected "persons," including municipalities, to suit without a notice of claim requirement. Thus, given the purpose of Congress in creating a federal remedy to supplement inadequate state remedies, *see Monroe*, 365 U.S. at 173-74, the absence of notice of claim requirements at common law, and their status as purely

statutory conditions to sue, Congress would have been explicit had it contemplated that § 1983 actions would only be available to plaintiffs who complied with notice of claim requirements.

In *Williams v. Horvath*, 16 Cal.3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976), the California Supreme Court addressed the application of a notice of claim requirement to § 1983 litigation. Justice Mosk, writing for a unanimous court, noted the close relationship between the 100-day California notice of claim requirement and the legislative restoration of governmental immunity after its judicial abrogation and rejected the application of the state notice of claim requirement to § 1983 actions.

The Wisconsin notice of claim requirement is part and parcel of the state immunity statute. Like the California Tort Claims Act, § 893.80 was adopted as part of a statute that restored partial governmental immunity following its abrogation. *See* A-17 (Abrahamson, J., dissenting). *See also* Legislative Council Report on § 893.80 (1976) *reprinted in* Wis. Stat. Ann. § 893.80 (West 1983). By applying this requirement to § 1983 litigation, the Wisconsin Supreme Court departed from principles established by this Court and effectively immunized the defendants from potential liability under § 1983.[21]

B. There Is No Deficiency in Federal Law That Requires Courts Entertaining § 1983 Actions To Borrow State Notice of Claim Requirements.

Under 42 U.S.C. § 1988, courts exercising jurisdiction over § 1983 actions are required to exercise their juris-

[21]Federal courts that have traced notice of claim requirements to state immunity doctrines have also rejected their applicability to § 1983 litigation. *See, e.g., Brown v. United States*, 742 F.2d 1498, 1508-09 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1073 (1985); *Donovan v. Reinbold*, 433 F.2d 738, 741 (9th Cir. 1970); *Willis v. Reddin*, 418 F.2d 702, 704-05 (9th Cir. 1969).

diction in conformity with suitable provisions of federal law. Federal law, however, sometimes fails to address matters that are essential to the conduct of litigation, and § 1988 governs how courts entertaining § 1983 actions fill gaps in federal law.[22]

In *Burnett v. Grattan*, 468 U.S. 42, 47-48 n.10 (1984), this Court adopted a three-step borrowing process under § 1988 to guide courts trying to fill gaps in federal law in § 1983 and other civil rights litigation. Initially, the deficiency clause of § 1988 requires courts hearing § 1983 actions to follow "the laws of the United States" except "where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law." Second, when there is a deficiency, § 1988 instructs courts to adopt the analogous state law policy. Finally, the inconsistency clause of § 1988 requires the rejection of borrowed state policies that are inconsistent with the purposes of § 1983.

The borrowing in which federal courts engage in § 1983 litigation is not open-ended and, in *West v. Conrail*, 107 S.Ct. 1538, 1542 n.6 (1987), this Court, discussing the use of state policies in § 1983 cases, observed that [t]he governing principle is that we borrow only what is necessary to fill the gap left by Congress." *Id.* at 1542 n.6.

The United States Court of Appeals for the District of Columbia applied this principle in *Brown v. United*

[22]This Court has held the federal choice of law statute, 42 U.S.C. § 1988 (1982), to be applicable to civil rights litigation in state courts. *See Sullivan v. Little Hunting Park*, 396 U.S. 229, 239-40 (1969) (§ 1982 action). *See also Maine v. Thiboutot*, 448 U.S. 1 (1980) (attorney fee provision of § 1988). *Cf. Wilson v. Garcia*, 471 U.S. 261, 265-66 (1985) (assuming that the appropriate limitations period for § 1983 would also apply in state courts). However, even if the first sentence in § 1988, which deals with choice of law, did not apply in state courts, this Court should still apply the same policies in state court § 1983 litigation as it applies in federal court § 1983 litigation as a matter of federal common law.

States, 742 F.2d 1498 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1073 (1985), when it rejected the application of a notice of claim requirement to § 1983 litigation. The *Brown* court noted that the issue was "neither how to incorporate into federal law as much state law as a federal action will tolerate, nor how best to further state policies and goals in the litigation of a federal action." *Id.* at 1504. Rather,

> the issue is how to best effectuate the federal policies embodied in a federal action when the action does not itself supply the complete legal framework necessary to the effectuation of those policies. Because the practice of borrowing presupposes a need to fill a deficiency in the federal scheme, a court must first look to see if there is indeed such a deficiency. *Id.*

This Court, however, has only found deficiencies in federal law in the area of statutes of limitations (and related policies on tolling and revival) and survival policies. *See Wilson v. Garcia*, 471 U.S. 261 (1985); *Burnett v. Grattan*, 468 U.S. 42 (1984); *Chardon v. Fumero Soto*, 462 U.S. 650 (1983) (revival); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) (tolling); *Robertson v. Wegmann*, 436 U.S. 584 (1978) (survival). On the other hand, the damages available in § 1983 actions, *see Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986); *Smith v. Wade*, 461 U.S. 30 (1983); *Carey v. Piphus*, 435 U.S. 247 (1978), the applicable immunities, *see Owen v. City of Independence*, 445 U.S. 622 (1980); *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and the absence of an exhaustion of administrative remedies requirement, *see Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496 (1982), are governed by uniform national policies that apply without regard to the law of the forum state.

A deficiency within the meaning of § 1988 only exists when federal law, including § 1983 and other applicable provisions of federal constitutional, statutory, or common law, does not address matters that are essential to the

conduct of litigation.[23] The mere existence of a state policy for which there is no federal counterpart does not support a finding that federal law is deficient.

In *Moor v. County of Alameda*, 411 U.S. 693, 702 (1973), this Court stated that "existing federal law will not cover every issue that may arise in the context of a federal civil rights action." In making this observation, the Court was stating an obvious fact of federal court litigation and was not construing the deficiency clause. *Moor* then assumed that there was a deficiency and held that § 1988 did not "authorize the wholesale importation into federal law of state causes of action." *Id.* at 703. Thus,

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[23]Federal law may also not be deficient because notice of claim requirements did not exist at common law. *See supra* II.A.3. Thus, the federal common law may require the rejection of notice of claim requirements in the absence of federal statutory notice of claim requirements. *Cf.* 28 U.S.C. § 2675(a) (statutory requirement of filing an administrative claim under the Federal Tort Claims Act); D.C. Code Ann. § 12-309 (1981) (congressionally approved notice of claim requirement for actions for unliquidated damages against the District of Columbia). Such a construction of § 1988 would require this Court to conclude that the phrase "laws of the United States" in the introductory language of § 1988 includes the federal common law. The argument has been made that Congress was only referring to "federal statutory law" when it used the unmodified phrase "laws of the United States" as contrasted to the "common law" that courts rely on when there is a deficiency. Eisenberg, *State Law and Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. Pa. L. Rev. 499, 515 (1980). However, given the lack of clarity in the language of § 1988, *id.* at 501, and the logic of using the narrower phrase to describe the law that was subject to being "modified and changed" by state positive law, Congress may well have expected courts to look to the federal common law before borrowing state law. Moreover, federal courts had broad authority over the common law in this pre-*Erie* era. *See generally Theis, Shaw v. Garrison: Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 La. L. Rev. 681 (1976). *See also* Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. Pa. L. Rev. 601 (1985) (urging courts to develop a federal common law of civil rights actions).

the Court rejected the use of § 1988 to borrow a state cause of action based on vicarious liability. *Accord Runyon v. McCrary*, 427 U.S. 160, 184-86 (1976) (construing the first sentence of § 1988 as not authorizing awards of attorney fees without addressing the deficiency clause).

In *Robertson v. Wegmann*, 436 U.S. 584 (1978), on the other hand, this Court relied on § 1988 to borrow a state policy on survival but again did not define the deficiency clause. After citing the statement in *Moor* that federal law does not cover every issue that may arise in civil rights actions, *id.* at 588, the *Robertson* Court treated state law as being deficient. The parties in *Robertson*, however, had assumed that § 1988 governed the choice of law issue and that federal law was deficient,[24] *see* 436 U.S. at 588, and this Court did not independently construe the deficiency clause. Thus, this Court has not adopted a test under which federal law is deficient simply because it does not cover a particular issue.

Federal courts that have addressed the question of the deficiency of federal law with respect to notice of claim requirements have found federal law not to be deficient and thus have not had any need to look to state law.[25] For example, in refusing to apply a notice of claim requirement to § 1983 litigation, the District of Columbia Circuit

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[24]The respondent in *Robertson* conceded that "the Civil Rights Act is silent as to the survival of actions under Section 1983" and that there was a "gap" or "deficiency," but argued that the borrowed Louisiana policy should be rejected because it was inhospitable to the § 1983 claim. Brief of Respondent at 6, *Roberston v. Wegmann*, 436 U.S. 584 (1978).

[25]*See, e.g., Brown v. United States*, 742 F.2d 1498, 1504-07 (D.C. Cir. 1984) (en banc), *cert denied*, 471 U.S. 1073 (1985); *Burroughs v. Holiday Inn*, 621 F.Supp. 351, 354 (W.D. N.Y. 1985); *Williams v. Allen*, 616 F.Supp. 653 (E.D. N.Y. 1985). *But cf. Cardo v. Lakeland Cent. School Dist.*, 592 F.Supp. 765, 772-73 (S.D. N.Y. 1984) (applying notice of claim requirement to § 1983 without making deficiency inquiry).

rejected a reading of § 1988 under which federal law would be considered "deficient" whenever federal law did not cover the issue. *Brown*, 742 F.2d at 1507 n.5. After reviewing this Court's § 1988 decisions, the *Brown* court concluded that a deficiency existed "only where the particular type of provision in question is deemed necessary and reasonable." *Id.*

Unlike statutes of limitations, which are "universally familiar procedural aspects of litigation, and . . . essential to a fair scheme of litigation," *id.* at 1506, notice of claim requirements are only applicable to litigation against governmental defendants and are in no way essential to govern litigation. Moreover, notice of claim requirements supplement the neutral statutes of limitations that are available to protect all litigants, and the absence of notice of claim requirements from federal law is not a deficiency within the meaning of § 1988.

When state courts entertain § 1983 actions, they must also determine whether the federal cause of action addresses the issue at hand. State courts, however, may look to state law at some point, because some provisions of federal law are uniquely applicable to federal court litigation.[26] For example, state courts entertaining § 1983 actions may follow the state rules of evidence and civil procedure as well as state policies on jury unanimity, forum non conveniens and venue as long as those state policies do not burden § 1983 litigation or conflict with its pur-

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[26]In some cases, state courts may also be required to determine what the federal common law policy would be in the absence of a policy uniquely applicable to federal courts. For example, if the Federal Rules of Civil Procedure were amended to require cautionary jury instructions on the non-taxability of damage awards, state courts entertaining FELA actions might still be required to apply the federal common law policy identified in *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980), and give such instructions.

poses. *Cf. Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950) (forum non conveniens); *Herb v. Pitcairn*, 324 U.S. 117 (1945) (which state courts will entertain FELA actions); *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211 (1916) (jury unanimity). On the other hand, state courts entertaining § 1983 actions should not be able to apply state policies such as notice of claim requirements, which do not have any federal counterpart and which are not essential to the conduct of the litigation.

C. The Use of State Notice of Claim Requirements Is Inconsistent with the Purposes of § 1983.

Even when there is a "deficiency" in federal law, courts are only required to borrow a state policy that is appropriate in light of the purposes of § 1983. *Burnett v. Grattan*, 468 U.S. 42, 52-53 (1984). Moreover, a borrowed state policy must also be examined under the inconsistency clause of § 1988, *see id.* at 53 n.15, and must be rejected if the state policy is inconsistent with § 1983's purposes of compensation and deterrence. *See also Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978).

In determining whether a particular state policy is appropriate for purposes of borrowing, the District of Columbia Circuit noted that "[s]tate law rules are borrowed out of the need to effectuate federal policies in the face of incomplete federal law, and they are not borrowed if they would incorporate into federal law balances of interests that are inconsistent with the policies underlying the federal action." *Brown*, 742 F.2d at 1504.

In finding the notice of claim statute applicable to § 1983 actions, the Wisconsin Supreme Court stated, "that the primary purpose of a notice of claim statute is to give the municipality the opportunity to attempt to compromise the claim and effect settlement before the parties are forced to proceed with a lengthy or costly lawsuit." (A-9)

That objective, though laudable, has little relevance to § 1983 cases. The notice of claim requirement is part of a statutory scheme that places a $50,000 limit on damages that may be recovered from municipalities. *See* Wis. Stat. Ann. § 893.80(3) (West 1983). That ceiling is inapplicable to § 1983 actions, *see Thompson v. Village of Hales Corners*, 115 Wis.2d 289, 340 N.W.2d 704 (1983), but the administrative mechanism under the notice of claim statute is not adapted to § 1983 claims which generally involve larger amounts and which "belong in court." *Burnett*, 468 U.S. at 50.

Moreover, notice of claim requirements burden the § 1983 cause of action. Commentators have characterized them as "often operat[ing] functionally as a trap for the unwary claimant," S. Sato & A. Van Alstyne, *State and Local Government Law* 792 (2d ed. 1977). Indeed, Judge Breitel of the New York Court of Appeals described them as a "mousetrap" except for the "practitioner who is skilled in tort case or claims against municipalities." *Murray v. City of New York*, 30 N.Y.2d 113, 121, 282 N.E.2d 103, 108, 331 N.Y.S.2d 9, 16 (1972) (Breitel, J., concurring). Finally, a former Corporation Counsel for the City of New York has characterized notice of claim requirements as a "lawyer's nightmare" and observed that even sophisticated accident-case lawyers occasionally get caught in the New York " 'mousetrap,' its sub-mousetraps . . . and their analogues all over the nation, which protect local governments from liability for their negligence." Richland, *Municipal Law: Government Mousetraps and Attorney Malpractice*, N.Y.L.J., at 1, col. 1 (Dec. 9, 1987).

The Wisconsin Supreme Court identified the primary purpose of the notice of claim requirements as "prevent-[ing] needless litigation and . . . sav[ing] unnecessary expenses and costs by affording an opportunity amicably to adjust all claims against municipal corporations before

suit is brought." (A-9) This Court, however, in *Burnett*, 468 U.S. 42 (1984), rejected a similar argument in support of the Maryland six-month statute of limitation based on the limitations period for filing administrative claims of employment discrimination. Maryland had claimed an interest in promptly identifying and resolving claims to protect public officials from unfounded and often stale claims, see *id.* at 54, but this Court rejected that argument as being "manifestly inconsistent with the central objective of the Reconstruction-Era civil rights statutes, which is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Id.* at 55.

III. THE USE OF STATE NOTICE OF CLAIM REQUIREMENTS IN § 1983 LITIGATION BURDENS THE LITIGATION OF § 1983 CLAIMS.

In reviewing state court judgments that rely on state law grounds, this Court can review both the adequacy and the independence of the state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1038 (1983). State court judgments based upon state "procedures" that burden the litigation of federal claims do not rest upon adequate state grounds. *See, e.g., Liner v. Jafco, Inc.*, 375 U.S. 301, 304-06 (1964) (state mootness requirements); *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 296 (1949) (burdensome state pleading requirements); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). Nor may state courts apply state policies that provide almost unlimited discretion on whether to reach federal claims. *See Sullivan v. Little Hunting Park*, 396 U.S. 229, 234 (1969) (rule concerning notice for reviewing transcripts).

This Court has also refused to rely on state procedural defaults that prevent the implementation of federal constitutional rights, when the application of state policies would "force resort to an arid ritual of meaningless form

. . . and further no perceivable state interest." *James v. Kentucky*, 466 U.S. 341, 349 (1984). In *James*, this Court held that a defendant whose lawyer requested an "admonition" rather than an "instruction" to the jury that no emphasis be given to the defendant's failure to testify was entitled to have his federal claims considered despite the state policy distinguishing "admonitions" from "instructions."

In the present case, within a few days of the incident Milwaukee's highest ranking police official, Police Chief Breier, received a letter from an Alderman advising him of the incident and requesting an investigation. *See* Ex. 35. Moreover, within hours of the incident, an extensive internal police investigation was begun. Nonetheless, the Wisconsin Supreme Court held that the alternative "actual notice" permitted under Wisconsin law was not provided.

It is difficult to identify any legitimate state interest that is furthered by requiring Felder to do more than was done in the present case. The Wisconsin notice of claim requirement provides municipalities with the opportunity to investigate and settle claims. It also limits municipal liability by requiring that notice be provided far in advance of the limitations period applicable to similar suits against non-municipal defendants. The present case, however, does not involve the typical tort claim governed by notice of claim requirements. Rather, it involves a serious allegation of police abuse in violation of federal constitutional protections. An actual investigation was carried out, and the defendants and their municipal employer have had every opportunity to attempt to settle the case despite the absence of a formal notice of claim. Thus, the use of the strict notice of claim requirement to dismiss Felder's § 1983 action would "force resort to an arid ritual of meaningless form."

The California Supreme Court recognized that state grounds may not be used to burden § 1983 actions in *Wil-*

liams v. Horvath, 16 Cal.3d 834, 841, 548 P.2d 1125, 1129-30, 129 Cal. Rptr. 453, 457-58 (1976), when it rejected the application of the state notice of claim requirement to state court § 1983 litigation, noting that "[t]he purposes underlying section 1983 . . . may not be frustrated by state substantive limitations couched in procedural language."

Likewise, Justice Bablitch, in his dissenting opinion below, characterized the 120-day notice of claim requirement as a "subtlety of state procedural law that must give way to the vindication of federal rights in state courts," (A-19) and this Court should reject the application of the notice of claim requirement to plaintiff's § 1983 action.

IV. THE APPLICATION OF STATE NOTICE OF CLAIM REQUIREMENTS TO STATE COURT § 1983 LITIGATION IS INCONSISTENT WITH IMPORTANT PRINCIPLES OF FEDERALISM.

The decision of the Wisconsin Supreme Court applying the notice of claim requirement to § 1983 litigation conflicts with an almost unbroken line of federal court cases.[27] The Wisconsin Supreme Court acknowledged this

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[27]The United States Courts of Appeals for the Second, Fifth, Ninth, Tenth, Eleventh and District of Columbia Circuits have all rejected the application of state notice of claim requirements to § 1983 litigation. *See Brandon v. Board of Ed. of the Guilderland Cent. School Dist.*, 635 F.2d 971, 973 n.2 (2d Cir. 1980); *Ehlers v. City of Decatur*, 614 F.2d 54, 56 (5th Cir. 1980); *Willis v. Reddin*, 418 F.2d 702 (9th Cir. 1969); *Donovan v. Reinbold*, 433 F.2d 738, 741 (9th Cir. 1970); *Rosa v. Cantrell*, 705 F.2d 1208, 1221 (10th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983); *Majette v. O'Connor*, 811 F.2d 1416, 1418 (11th Cir. 1987). *Cf. Brown v. United States*, 742 F.2d 1498, 1500 & n.2 (D.C. Cir. 1984) (en banc) (rejecting application of District of Columbia six-month notice of claim requirement to "constitutional tort" claims, including *Bivens* and § 1983 actions), *cert. denied*, 471 U.S. 1073 (1985). *But see Dearv v. Three Un-Named Police Officers*, 746

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line of cases but treated their applicability to state court § 1983 actions as "arguably minimal, if not nonexistent." (A-11) The state court then noted that plaintiffs who failed to comply with notice of claim requirements could bring their § 1983 actions in federal court. (A-12)

The decision of the Wisconsin Supreme Court, if permitted to stand, will discourage plaintiffs from litigating § 1983 claims in state courts. By interpreting § 1983 to permit state courts to use policies not applicable in federal courts, the Wisconsin Supreme Court effectively forces § 1983 litigation into federal courts. When § 1983 plaintiffs in Wisconsin, for whatever reasons,[28] do not file notices

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F.2d 185, 189 n.2 & 193 (3d Cir. 1984) (failure to comply with the notice of claim requirement of the Virgin Islands Tort Claims Act bars § 1983 claim against the Virgin Islands).

Virtually all the district courts that have addressed this issue have also rejected the application of notice of claim requirements to § 1983 litigation. *See* Petition for Certiorari, at 15 n.9 (listing district court decisions).

[28]At the time plaintiff filed his Second Amended Complaint on March 8, 1984, there were no reported decisions requiring compliance with notice of claim statutes in § 1983 litigation. Moreover, state and federal courts in Wisconsin had explicitly rejected the use of notice of claim requirements in § 1983 actions. *See Perrote v. Percy*, 452 F.Supp. 604, 605 (E.D. Wis. 1978); *Mathias v. City of Milwaukee Dep't of City Dev.*, 377 F.Supp. 497, 500 (E.D. Wis. 1974); *Doe v. Ellis*, 103 Wis.2d 581, 309 N.W.2d 375 (Ct. App. 1981).

Although the Seventh Circuit had not directly addressed the issue, in *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974), Justice (then Judge) Stevens rejected the application of the Illinois Tort Immunity Act, Ill. Rev. Stat. Ch. 85, §§ 1-101 *et seq.* (1969) which contained a notice of claim requirement, *see* Ch. 85, § 8-102, *repealed by* Pub. Act 84-1431, art. 1, § 3 (1986), to § 1983 litigation in federal courts as a matter of federal law. *See also Luker v. Nelson*, 341 F.Supp. 111, 116-19 (N.D. Ill. 1972) (application of notice of claim requirement to § 1983 actions rejected as a matter of state law); *Firestone v. Fritz*, 119 Ill. App.3d 685, 456 N.E.2d 904 (1983) (same).

of claim within 120 days of an incident, they will have little choice but to file their § 1983 actions in federal courts.[29]

In construing § 1983 similarly in state and federal court, this Court has been mindful of the implications on federalism of permitting state courts to read § 1983 more narrowly than federal courts. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), for example, this Court relied on considerations of federalism to hold that attorney fees were available to prevailing parties in state court § 1983 litigation. Justice Brennan, writing for the majority, noted that "[i]f fees were not available in state courts, federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts." *Id.* at 11 n.12. Similarly, if state courts can impose conditions on litigating § 1983 cases that do not apply in federal courts, serious federalism concerns would be raised because plaintiffs would avoid filing their § 1983 claims in state courts.[30]

Most § 1983 litigation has taken place in federal courts since *Monroe* began the modern era of § 1983 litigation. In recent years, however, an increasing number of plaintiffs have filed § 1983 actions in state courts, and an important

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[29]Plaintiffs who do not file timely statutory notices may comply with §893.80 if there is "actual notice" of the claim and the plaintiffs show that defendants were not prejudiced. (A-12--A-13) Nonetheless, few plaintiffs will risk the uncertainty of filing § 1983 actions in the Wisconsin state courts after the expiration of the 120-day statutory period.

[30]In addition, plaintiffs to whom the federal courts are closed because of limitations on the power of federal courts, *see, e.g., Green v. Mansour*, 474 U.S. 64 (1986) (eleventh amendment); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) (comity), would have no available forum to litigate § 1983 claims if they had not complied with state notice of claim requirements.

state court § 1983 practice has begun to develop.[31] The application of notice of claim requirements to state but not federal court § 1983 litigation, however, will have the inevitable result of arresting this development.

This issue, of course, does not simply involve federal court caseloads. Rather, it raises more important questions about the role of state courts in our system of judicial federalism. For state courts to play their proper role in enforcing federal rights, plaintiffs should not be discouraged from filing § 1983 claims in state courts. The Oklahoma Supreme Court recognized this facet of federalism in *Willborn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986), when it refused to exclude from the Oklahoma courts § 1983 actions brought by plaintiffs who had not complied with the notice of claim requirement.

> Consistent with our system of judicial federalism, which provides litigants with a double-barreled system of judicial protection, the remedy provided by § 1983 may be available even if the state remedy is barred by the statute of limitations under the Political Subdivision Tort Claims Act. *Id.* at 805 (footnote omitted).

By requiring plaintiffs in state court § 1983 litigation to comply with the notice of claim statute, the Wisconsin Supreme Court departed from these basic principles and erected a barrier that limits access to state courts and forces § 1983 litigation into federal courts.

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[31]*See Steinglass, The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. Miami L. Rev. 381 (1984). There are no available statistics on the volume of § 1983 litigation in state trial courts, but the increase in reported state appellate court opinions suggests the emergence of a significant state court § 1983 practice. *See id.* at 434-35 & nn. 266 & 269.

V. THE TENTH AMENDMENT DOES NOT REQUIRE THE USE OF STATE NOTICE OF CLAIM POLICIES IN STATE COURT § 1983 LITIGATION.

In requiring § 1983 plaintiffs to comply with the state notice of claim statute, the Wisconsin Supreme Court did not consider the impact on federalism of forcing § 1983 litigation into the federal courts. Rather, the court conceded that § 1983 plaintiffs who were excluded from state courts could file § 1983 actions in federal court but viewed this as the result of the tenth amendment which barred Congress from "prescrib[ing] the procedural scheme under which [federal] claims may be heard in state court."[32] (A-12)

The tenth amendment limits the extent to which the federal government may impose federal policies on state institutions, and this Court has commented on the difficulty of defining "the nature and content of those limitations." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985). Although there may be federal regulations of the state judicial process that do not pass constitutional muster, the rejection of notice of claim requirements in the state court litigation of § 1983 actions does not come close to invading that core of sovereignty that states retain. Thus, it is not necessary in this case "to identify or define what affirmative limits the constitutional structure might impose on federal actions affecting the States. . . ." *Id.* at 556.

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[32]In reaching this conclusion, which it apparently based on the tenth amendment, the Wisconsin Supreme Court expressly relied on *Kramer* v. *Horton*, 128 Wis.2d 404, 383 N.W.2d 54, *cert. denied*, 107 S.Ct. 324 (1986), its § 1983 exhaustion case. (A-8; A-12) Neither *Kramer* nor the present case, however, discusses or even cites *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), or any of this Court's tenth amendment cases.

This Court has not directly addressed whether the tenth amendment ever prohibits Congress from regulating "procedural" attributes of federal actions in state courts. The Wisconsin Supreme Court's conclusion, however, is inconsistent with decisions of this Court requiring state courts that entertain federally-created actions to follow federal policies. *See, e.g., Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952) (trial by jury); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949) (pleading requirements); *Garrett v. Moore-McCormick Co.*, 317 U.S. 239 (1942) (burden of proof).

Moreover, this Court has refused to apply the tenth amendment to limit the power of the federal government to set the agenda for other state institutions. In *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982), this Court rejected Mississippi's tenth amendment challenge to the Public Utilities Regulatory Policies Act of 1978. The act required states to consider certain energy-saving approaches to public utility rate-making. In reviewing this issue, the Court relied on *Testa v. Katt*, 330 U.S. 386 (1947), which required state courts to entertain a federally-created cause of action. Because Mississippi had chosen to regulate public utility rates, this Court upheld the federal requirement. *Cf. Puerto Rico v. Branstad*, 107 S.Ct. 2802 (1987) (federal courts may order state governors to perform federal duties involving extradition).

The requirement that a prospective litigant file a notice of claim with the clerk of the local legislative body before commencing a civil action is hardly an "indisputabl[e] 'attribute of state sovereignty.'" *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981). Nor would a decision rejecting notice of claim requirements in state court § 1983 litigation "directly impair [the State's] ability 'to structure integral operations in areas of traditional governmental functions.'" *Id.*

Any impact on state courts that might flow from giving § 1983 plaintiffs direct access to state courts without regard to notice of claim requirements is likely to be minimal and indirect. The volume of state court § 1983 litigation pales in comparison to the volume in federal court, and § 1983 litigation will continue virtually unabated even if states can apply notice of claim requirements in their own courts. Moreover, most § 1983 plaintiffs will attempt to comply with notice of claim requirements anyway to preserve their state law claims. *Cf. Wilson v. Garcia*, 471 U.S. 261, 285 (1985) (O'Connor, J., dissenting) (discussing statutes of limitations). Finally, state notice of claim requirements do not affect what actually takes place in court, and the only potential impact on state courts of a decision rejecting the use of notice of claim requirements is a small increase in state court § 1983 litigation in those few states that require § 1983 plaintiffs to file notices of claim.

Likewise, the impact on other branches of state government is also minimal. Local governmental bodies will lose the "opportunity" to quickly investigate and compromise § 1983 claims. That impact may be significant in traditional municipal tort litigation involving defective sidewalks, roads, bridges and playgrounds. *See generally* Brochard, *Government Liability in Tort*, 34 Yale L.J. 229, 229-40 (1925). Notice of claim requirements, however, have little, if any, relevance to § 1983 actions involving allegations of excessive force and other serious constitutional violations. Section 1983 litigation, as Judge Easterbrook has noted, *see Kirchoff v. Flynn*, 786 F.2d 320, 323-24 (7th Cir. 1986), is significantly more complex than traditional tort litigation. Section 1983 cases often involve allegations of serious governmental misconduct, and plaintiffs must usually prove more than mere negligence to prevail. *See, e.g., Daniels v. Williams*, 474 U.S. 327 (1986); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Washington v. Davis*, 426 U.S. 229

(1976). Moreover, § 1983 litigation frequently involves defendants whose professional reputations and careers are threatened because of the seriousness of the alleged violations. Thus, threshold issues of liability are as likely to be contested as are issues of damages, and, not surprisingly, § 1983 cases are among the most difficult to settle. Notice of claim requirements do little to advance the settlement of such cases.

To the extent the tenth amendment requires a balancing approach in which the strengths of the federal and state interests are compared, *see Garcia*, 469 U.S. at 562 (Powell, J., dissenting), the federal interest in guaranteeing litigants with federal claims direct access to state courts outweighs any state interest in establishing special preconditions for raising federal claims in state courts.

The state courts play a fundamental role in our system of judicial federalism. Congress was not required to establish inferior federal courts, and the Constitution contemplated the possibility of state courts being the only courts in which federal causes of action could be tried. Moreover, prior to the creation of federal question jurisdiction in 1875, *see* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, state courts were the principle forums in which most federal claims were raised. *See generally* Gibbons, *Federal Law and the State Courts 1790-1860*, 36 Rutgers L. Rev. 399 (1984). Any interpretation of the tenth amendment that prohibits Congress from regulating the remedial attributes of federal claims that are litigated in state courts ignores this fundamental aspect of our federal judicial system.[33]

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[33]This Court has also noted that "the sovereignty of the States is limited by the Constitution itself." *Garcia*, 469 U.S. at 548. Whatever limitations on the power of Congress under

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CONCLUSION

For these reasons, the judgment and opinion of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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the Commerce Clause remain after *Garcia*, legislation enacted under the authority of § 5 of the fourteenth amendment, like § 1983, *see Mitchum v. Foster*, 407 U.S. 225, 238 (1972), is subject to fewer constraints. *Cf. Milliken v. Bradley*, 433 U.S. 267, 291 (1977).